



September 14, 2012

Via Express Mail

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
1301 Constitution Ave., NW  
Room 6416J  
Washington, DC 20004  
hq.foia@epa.gov

Re: **Freedom of Information Act Appeal**  
**Request Number HQ-FOI-01861-12**  
**(Proposed Rules, Summer/Fall 2012)**

To Whom It May Concern:

This is an appeal of the Environmental Protection Agency's ("EPA") erroneous denial of Landmark Legal Foundation's ("Landmark") request for expedited processing of its August 17, 2012 Freedom of Information Act Request. By Mr. Larry F. Gottsman's letter dated August 29, 2012, the EPA granted Landmark's request for a fee waiver but denied expedited processing. Specifically, the letter stated, "You have not demonstrated that the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual."

Left unaddressed was Landmark's demonstration of compelling need for the documents requested because Landmark is an entity "primarily engaged in disseminating information" and has an "urgency to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. Section 552(a)(6)(E)(v); 40 CFR 2.104(e)(1)(ii). Mr. Gottsman's dismissive conclusion that Landmark has not demonstrated a "life or death" justification for expedited processing utterly disregards EPA's statutory duty for a fulsome consideration of FOIA requests. This is particularly troublesome given EPA's history of failing to comply both with the Act and with court orders in Landmark's previous FOIA litigation EPA. See Landmark Legal Foundation v. EPA, 272 F.Supp. 2d 70, 73 (D.D.C. 2003) (Agency's failure to comply with a U.S. District Court preliminary injunction order resulted in order that "EPA will be held in contempt, and ordered to pay sanctions . . . as a result of EPA's contumacious conduct").

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## **I. Introduction**

Landmark's original request, attached hereto as Exhibit A, requests public records related to published reports that the EPA is intentionally delaying the issuance of controversial new regulations until after the November elections. Landmark specifically seeks information relating to any EPA rule or regulation for which public notice has not been made, but which is contemplated or under consideration for public notice between January 1, 2012 and August 17, 2012.

As demonstrated below, Landmark met the statutory and regulatory requirements for expedited processing by demonstrating a compelling need, given the timeliness of this matter in light of the upcoming election as well as the seriousness of politicization of the EPA. Moreover, Landmark is a tax exempt organization with a long record of widely disseminating public records through various media outlets as part of its public education program.

## **II. Landmark's Request Should Receive Expedited Processing.**

In order to receive expedited process under EPA regulations, a FOIA request must show a "compelling need" by either: (1) establishing that the failure to obtain the records quickly could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; OR (2) if you are a person primarily engaged in disseminating information, by demonstrating that an urgency to inform the public that actual or alleged Federal Government activity. 40 CFR 2.104 (e)(i)-(ii) (2011) (emphasis added). See ACLU v. Department of Justice, 321 F.Supp. 2d 24, 27-28 (D.D.C. 2004).

### **A. There is a Compelling Need For Public Disclosure of the Requested Records.**

There is a compelling need for the immediate release of the information requested. With respect to entities "primarily engaged in disseminating information," a compelling need is demonstrated by an "urgency to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. Section 552(a)(6)(E)(v)(II). Among the factors to be considered as to whether there is a compelling need are "(1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity." ACLU, 321 F.Supp.2d at 29.

The requested records relate directly to several matters of tremendous public interest and debate as shown by the attached exhibits, including the delay of the rulemaking process because of an upcoming election. Landmark attached a sample of the news reports covering the regulatory delay, which had been the subject of commentary by members of the United State Congress. This delay raises the possibility that the Obama Administration has improperly politicized the EPA, the possibility that the EPA's leadership is intentionally concealing its regulatory activity from an unwary public, and/or the possibility that the EPA's leadership is putting the partisan interests of a particular candidate above the safety of the general public by delaying controversial regulations. Each one of these issues is a matter for immediate and full disclosure.



There are many significant public interests implicated in the possibility that the EPA's activities have been politicized. The health and wellbeing of the public as well as the economic wellbeing of the country are at stake with improper environmental regulation. Delay puts these at risk and prevents the American public from being able to engage in timely, thoughtful debate over the extent of regulation and the management of the EPA. Furthermore, these issues regarding EPA's regulatory activities (the EPA's fulfillment of its responsibilities to inform the public and submit to appropriate congressional oversight, and the possibility that the EPA has put partisan interests above the health and wellbeing of the general public) should be considered by the American public before voting in this year's presidential and congressional elections.

The request makes clear that the records requested are of critical importance to an ongoing national debate -- the extent to which the EPA has been politicized and whether EPA officials are putting the partisan interests of a particular candidate above the transparent conduct of official business. There is no question that release of the records requested would be in the public interest because they would contribute significantly to the public understanding of "actual or alleged" activities of the government. See 5 U.S.C. Section 552(a)(6)(E)(v)(II).

Moreover, EPA has a history of failing to comply with Landmark's FOIA requests seeking records similar to those sought in this request. This in and of itself presents a compelling public interest justifying expedited processing of this request.

In short, Landmark meets the factors established by statute and regulation for a compelling need.

#### **B. Landmark is Primarily Engaged in Disseminating Information.**

As part of its mission as a tax-exempt, public interest law firm, Landmark investigates, litigates and *publicizes* instances of improper and/or illegal government activity. Courts have found that organizations with missions and information-dissemination activities similar to Landmark's are "primarily engaged in disseminating information." See, e.g., American Civil Liberties Union v. Dep't of Justice, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding that one of the plaintiffs is a public interest group that "gathers information of potential interest into a distinct work, and distributes that work to an audience" is "primarily engaged in disseminating information"). As demonstrated in its original request, Landmark will take various steps to disseminate responsive information to the public. Specifically, Landmark will post information on its web site; include the information in its newsletters; disseminate information via various widespread distribution technologies; publish articles in large circulation print media; and issue press releases to a wide range of media outlets.

In Elec. Privacy Info. Ctr. v. DOD, 241 F. Supp. 2d 5 (D.D.C. 2003), the D.C. District Court found that a public interest group was "primarily engaged in disseminating information" for purposes of the FOIA. The court reasoned that the group "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience." Elec. Privacy Info. Ctr. v. DOD, 241 F. Supp. 2d

5, 11 (D.D.C. 2003)(citing National Sec. Archive v. U.S. Dep't of Defense, 880 F.2d 1381, 1387 (D.C. Cir. 1989).

Moreover, Landmark's work is discussed on hundreds of radio stations throughout the country on a regular basis on both national and local talk shows. Numerous newspapers, news programs, blogs and other media outlets also discuss Landmark and its work regularly. As noted on Landmark's website, one of "Landmark Legal Foundation's primary activities is to disseminate to the public information about the conduct of governmental agencies and public officials that runs afoul of constitutional limits or ethical standards." [www.landmarklegal.org](http://www.landmarklegal.org) (last visited September 14, 2012). Landmark gathers information of potential interest to the public, especially those with a conservative viewpoint, analyzes the information, and then creates a report or summary of that information which it distributes to Landmark's audience through newsletters, reports, and its webpage. Landmark's audience includes its supporters, including official advisors, news media, visitors to its website and the general public when Landmark officials discuss the information in print, television and radio.

In Leadership Conf. on Civil Rights, the Court found that requestor Leadership Conference, a "nonpartisan coalition of over 180 national organizations representing men and women of all ethnic backgrounds and races" met the information dissemination standard. The Court stated:

Plaintiff is primarily engaged in the dissemination of information regarding civil rights. Plaintiff's mission is to serve as the site of record for relevant and up-to-the minute civil rights news and information....Plaintiff disseminates information regarding civil rights and voting rights to educate the public, promote effective civil rights laws, and ensure their enforcement by the Department of Justice. Leadership Conf. on Civil Rights, 404 F. Supp. 2d 246, 260.

Similarly, Landmark Legal Foundation is primarily engaged in the dissemination of information. Much of this information is related to the federal government's violation of civil rights. Landmark has a long history of monitoring the activities of several federal agencies, including the EPA. Landmark established the first comprehensive database of EPA grants on its website. Landmark stays current on EPA activity, reviewing and commenting on EPA proposed regulations and assisting the challenges to EPA actions as *amicus curiae* in court. Landmark disseminates this information to its members and the readers of its newsletters and website. Landmark's ability to process EPA information and activities and convey it in an understandable manner to the public makes it highly sought after for its opinion and editorial content.

Upon receipt of the requested information in this matter, Landmark will promptly analyze and disseminate the requested material. Landmark will take several steps, among others, to ensure that the public has access to the information:

1. Landmark will post responsive information on its web site ([www.landmarklegal.org](http://www.landmarklegal.org)), which is accessed regularly by thousands of individuals and makes the information available to potentially millions of citizens;



2. Landmark will utilize its extensive contacts in radio broadcasting to ensure proper public dissemination of requested records;
3. Landmark will include the information in its newsletter, which is distributed to thousands of individuals, groups, and the media;
4. Landmark will disseminate the information via its widespread distribution technology, which reaches hundreds of media outlets, reporters, editorial writers, commentators and public policy organizations;
5. Landmark staff will use the information to publish articles in print media, many of which are widely circulated. Landmark has successfully published such articles in the past;
6. Landmark will issue press releases to specific media outlets; and
7. Landmark staff will appear on television and radio programs.<sup>1</sup>

Landmark has a proven record of ensuring that information it receives through FOIA requests garners widespread attention in print, electronic and broadcast media. Landmark's investigations have been cited by the Associated Press, The Wall Street Journal, The Washington Post, The Washington Times, and Fox News Channel.

In short, Landmark meets the relevant definitions for a person primarily engaged in disseminating information and a compelling need.

### **III. Conclusion**

If Landmark's FOIA Request is not expedited, the potential exists for spoliation of evidence that could demonstrate improper Agency conduct. Expediting Landmark's Request will allow Landmark – and the public – to understand an issue of national interest.

Please note, Landmark has previously been involved in extensive litigation arising from a governmental agency's failure to properly produce documents in accordance with its obligations under the FOIA. See Landmark Legal Foundation v. Environmental Protection Agency, 272 F.Supp.2d 70 (D.D.C. 2003). In that case, the EPA destroyed records in violation of a preliminary injunction and failed to properly circulate Landmark's Request to relevant departments within the Agency. Consequently, the Agency was found in civil contempt of court. Landmark expects the EPA to fully comply with the legal mandates set forth in the FOIA.

Furthermore, please provide assurances that EPA officials are taking steps to prevent destruction of repositories of information that may hold records responsive to this request.

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<sup>1</sup> See Judicial Watch, Inc. v. Rosotti, 326 F.3d 1309, 1314 (D.C. Cir. 2003). Here, the Court determined that an entity who provided "nine ways in which it communicates collected information to the public" sufficiently justified how disclosure would contribute to the public's understanding as to the activities of the federal government.

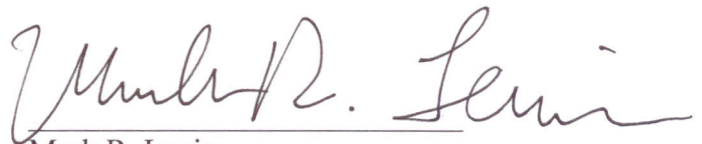
Additionally, be aware that any actions taken in contravention of the Agency's responsibilities will be raised if this request becomes the subject of litigation.

For the reasons stated above, Landmark asks that the EPA grant Landmark's appeal of the denial of its request for expedited processing. You may contact Matthew Fors at (703) 554-6100 if you have any questions. Please deliver responsive records to Mr. Fors's attention at the following address:

Matthew Fors  
Landmark Legal Foundation  
19415 Deerfield Ave.  
Suite 312  
Leesburg, VA 20176

**Certification**

Pursuant to Agency regulations and as required by law, I certify, to the best of my knowledge, that the above facts are true and correct.

A handwritten signature in black ink, appearing to read "Mark R. Levin". The signature is fluid and cursive, with a horizontal line drawn underneath it.

Mark R. Levin  
President  
Landmark Legal Foundation